86-979 (1)

Supreme Court, U.S.
FILED
DEC 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

VICKEY DORSEY and TIMOTHY D. McCOLLUM,

Petitioners,

v.

GEORGE T. HOWARD, Individually,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WILLIAM D. MALLARD, JR.
MALLARD & MINOR
2900 Chamblee-Tucker Rd.
Building 6
Atlanta, Georgia 30341
(404) 457-9077
Attorney for Petitioners

37 pp

QUESTIONS PRESENTED

Did the District Court and Court of Appeals err in determining that petitioners have no property right in being considered on their merits for Postal Service employment?

Did the District Court and Court of Appeals err in determining that no liberty interest of the petitioners was infringed?

Did the District Court and Court of Appeals err in determining that there were no issues of material fact to be resolved?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below were the Petitioners, Vickie Dorsey and Timothy D. McCollum, Plaintiffs below, and George T. Howard and the United States Postal Service, Defendants below.

NOTICE OF BELIEF THAT PARTY BELOW LACKS INTEREST IN THE OUTCOME

Pusuant to Rule 19.6 of the Rules of the Supreme Court of the United States, notice is hereby given that petitioners believe that the United States Postal Service has no interest in the outcome of this petition. Petitioners have not sought herein review of the judgment below in favor of the Postal Service. Only petitioners' claims against the Postmaster, George T. Howard, in his individual capacity are the subject of this Petition.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

NOTICE OF BELIEF THAT PARTY BELOW LACKS INTEREST IN THE OUTCOME iii

TABLE OF AUTHORITIES vi

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Course of Proceedings in the Court Below 4

B. Statement of Facts 5

C. Existence of Jurisdiction in the Court Below 9

REASONS FOR GRANTING THE WRIT 9

I. THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT PETITIONERS HAVE NO PROPERTY RIGHT IN BEING CONSIDERED ON THEIR MERITS FOR POSTAL SERVICE EMPLOYMENT 9

II. THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT NO LIBERTY INTEREST OF PETITIONERS WAS INFRINGED 14

III. THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT THERE WERE NO ISSUES OF MATERIAL FACT TO BE RESOLVED 15

CONCLUSION 17

APPENDIX

1. Opinion of the United States Court of Appeals for the Eleventh Circuit ..... App. 1

2. Opinion of the United States District Court for the Northern District of Georgia ..... App. 3

3. Judgment of the United States Court of Appeals for the Eleventh Circuit ..... App. 9

TABLE OF AUTHORITIES

Cases — Page

Bell v. Hood, 327 U.S. 678 (1946) 11

Bishop v. Wood, 426 U.S. 341 (1976) 12, 14

Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 11

Board of Regents v. Roth, 408 U.S. 564 (1972) 12

Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1961) 14

Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985) 9

Davis v. Passman, 442 U.S. 228 (1979) 11

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 13, 14

Peoples Gas, Light and Coke Company v. United States Postal Service, 658 F.2d 1182 (7th Cir. 1981) 12, 14

Perry v. Sinderman, 408 U.S. 593 (1972) 9

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 13

Truax v. Raich, 239 U.S. 33 (1915) 10

United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) 14

Warrior Tombigbee Transportation Co. v. M-V Nan Fung, 695 F.2d 1294 (11th Cir. 1983) 15

Wieman v. Updegraff, 344 U.S. 183 (1952) 13

Young v. United States, 498 F.2d 1211 (5th Cir. 1974) 12

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Fifth Amendment to the Constitution of the United States 9, 12, 15

28 U.S.C. 1254(1) 2

28 U.S.C. 1291 9

28 U.S.C. 1331 9

39 U.S.C. 1001(b) 12

Rule 56, Federal Rules of Civil Procedure 15

USPS Handbook, P-11 Personnel Operations, Sections 261.324a, 264.1, 264.21, 265.2 12

No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

VICKEY DORSEY and TIMOTHY D. McCOLLUM,

Petitioners,

v.

GEORGE T. HOWARD, Individually,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Vickey Dorsey and Timothy McCollum hereby petition that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on September 16, 1986.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on September 16, 1986 (Nos. 86-8174 and 86-8176). The opinion, which is unreported, is contained in the Appendix at page 1. The opinion of the United States District Court for the Northern District of Georgia, which is not reported, is contained in the Appendix at page 3. The judgement of the United States Court of Appeals is contained in the Appendix at page 9.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 16, 1986 affirming judgment against petitioners entered by the United States District Court for the Northern District of Georgia on December 31, 1985.

The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1001(b) of 39 U.S.C. provides:

"Officers and employees of the Postal Service (other than those individuals appointed under Sections 202, 204, and 1001(c) of this Title) shall be in the Postal Career Service, which shall be a part of the Civil Service. Such appointments and promotions shall be in accordance with the procedures established by the Postal Service. The Postal Service shall establish procedures, in accordance with this Title, to assure its officers and employees meaningful opportunities for promotion and career development and to assure tis officers and employees full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions, with representatives of their own choosing."

Section 261.324a of United States Postal Service Handbook P-11, Personnel Operations, provides:

"The appointing officer must consider all available qualified applicants in the priority order. The appointing officer may select any applicant in the highest priority group but may not select from a lower group as long as there are three qualified applicants in a higher group (or in a combination of higher groups) still available. If three persons are available in group one, the appointing officer may not appoint a person from a lower group; if three veterans are available, either 10 point or 5 point, the appointing officer may not appoint a non-veteran, except as provided in 265.7 (procedure when passing over a preference eligible)."

Section 264.1 of United States Postal Service Handbook P-11, Personnel Operations, provides:

"Appointing officers are responsible for making selections for appointment. They may not discriminate for any nonmerit factors such as race, religion, color, sex, national origin, age, or physical handicap."

Section 264.21 of United States Postal Service Handbook P-11, Personnel Operations, provides:

"Selection is made from among the three hightest rated eligibles who are available for the type of appointment being offered from the appropriate register. However, a preference eligible may not be passed over to select a nonpreference eliglible who is lower on the register unless selection is documented. See 265.7. (Note: At the appointing officer's option, a selection may be made, even if only one or two eligibles are available.)"

Section 265.2 of United States Postal Service Handbook P-11, Personnel Operations, provides:

"Appointing officers are required to select the best qualified applicants from the register of eligibles. To do this, the *rule of three* must be used in making selections (See 264.2). Eligibles found not suitable are disqualified as described in 310 and 320."

STATEMENT OF THE CASE

A. Course of Proceedings in the Courts Below

On March 19, 1985, petitioners Timothy McCollum and Vickie Dorsey, brother and sister, each filed suit against United States Postal Service and the Rome, Georgia Postmaster, George T. Howard, alleging that defendants refused to accord petitioners full

and proper consideration on their merits for federal employement for which they qualified. Petitioners alleged that the decision not to employ them was based on the Postmaster's personal dislike for the family of the two petitioners. R1-1-3.*

Defendants filed a single motion to dismiss or for summary judgment applicable to both cases on June 20, 1985. R1-7. On December 31, 1985, in a single Order applicable to both cases, the District Court granted the defendants' Motion for Summary Judgment, holding that petitioners had no protected property or liberty interests in the circumstances set forth in their complaints. R1-14. Notices of Appeal were filed by both petitioners on Febuary 27, 1986. R1-16; *Vickie Dorsey v. Howard* Record 1-15.

The United States Court of Appeals for the Eleventh Circuit entered judgment affirming the judgment of the United States District Court on September 16, 1986. App. p. 9. Only petitioners' claims against George T. Howard, the Postmaster in Rome, Georgia, in his individual capacity are the subject of this Petition.

B. Statement of Facts

On October 23, 1979 both petitioners applied for employment as substitute rural carriers with the Rome, Georgia Post Office. They both passed the required examination, Timothy McCollum with a rating of 86, Vickie Dorsey with a rating of 88. These ratings placed both petitioners in the upper one-forth of persons eligible for substitute rural carrier positions at the Rome Post Office. R1-11-26, 27, 36.

Question number 15 on the application for employment completed by both petitioners was whether the applicant had any relatives working for the federal government. Although the petitioners' mother, father and brother worked for the Postal Service at this time, petitioners responded in the negative because they were under the impression that since the Postal Service was now an independent agency, it was no longer

*Unless otherwise noted, all references to the record are to the District Court record in *Timothy McCollum v. Howard, et al.*, Court of Appeals No. 86-8176.

part of the federal government. R1-11-27, 37.

In December 1979 both petitioners met separately with respondent, Postmaster George T. Howard concerning their possible employment. Both petitioners state that no discussion of their application or their answers to questions on the application took place. R1-11-27, 37. In an earlier lawsuit involving Timothy McCollum, his brother and his mother, the Postmaster testified that he showed Timothy McCollum his application, asked him if it were his application and signature, asked if he understood the questions and the statement he signed and if he answered to the best of his knowledge. Mr. Howard also testified that on January 3, 1980 he wrote the Atlanta Sectional Center Director of Employee and Labor Relations asking for advice on how to proceed with the McCollum application. R1-11-27.

In April 1980 both petitioners wrote the Postmaster asking about the status of their applications. In May 1980 the Postmaster notified both petitioners that they were disqualified for falsification of their applications. R1-11-28, 37. Vickie Dorsey wrote the Postmaster General concerning this disqualification and received a response from Assistant Postmaster General Nancy George, stating that her negative response to Question 15 was obviously a mistake and not deliberate falsification and that she should reapply for the substitute carrier register. R1-11-33, 34. She did so and was restored to the register. Timothy McCollum thought that her restoration would automatically mean his restoration also. As it turned out, he had apparently never been removed from the register since he later learned that his name appeared on numerous hiring worksheets funished to the Rome Post Office from the Atlanta Sectional Center during 1980 and 1981. R1-11-28. Vickie Dorsey, after applying for restoration to the register, also verified with the Atlanta Sectional Center that both she and Timothy McCollum were on the register. R1-11-38.

Timothy McCollum also received a February 26, 1982 letter from the Atlanta Sectional Center Manager notifying him that the

substitute rural carrier register which he was on was being merged with the regular rural carrier register and giving him the opportunity to remain on the new register. He took advantage of such opportunity. R1-11-28, 29, 37. In accordance with Postal Service regulations Timothy McCollum remained on the combined register from February 1982 through February 1984. During that period of time the Rome Postmaster selected two substitute rural carriers for vacant regular rural carrier positions. R1-11-44.

Timothy McCollum first appeared on a hiring worksheet on December 19, 1979. He appeared on several later worksheets including one of January 12, 1981 in which his name was first on the list. R1-11-29. The names on hiring worksheets are listed in order of qualification by examination score. R1-11-47. From the January 12 list the Postmaster selected a female who was ranked eighth on that list for a substitute rural carrier position. R1-11-30.

Vickie Dorsey's name first appeared on a hiring worksheet on December 19, 1979 and on several subsequent hiring worksheets up to and including December 30, 1980. On the December 30, 1980 list the symbol "FR" appears by her name on the list. She subsequently learned that this symbol means failure to respond to a call-in notice for interview. She states that she did not receive any call-in notice. By means of a September 8, 1983 letter from the Atlanta Sectional Center, Ms. Dorsey learned that Mr. Howard had stated that she failed to respond to a call-in notice related to the December 30, 1980 list, and that the Postal Service therefore removed her from the register. R1-11-38, 39.

In the earlier trial referred to above, the Postmaster testified to four different reasons for not hiring petitioners:

1. Falsification of application
2. Impossible to work with or around
3. Too many members of one family at one Post Office
4. Failure to respond to call-in notice R1-11-30, 39.

The Atlanta Sectional Center and the Assistant Postmaster

General for Employee Relations do not feel that petitioners' applications were falsified. Both these offices are above the Rome Post Office in the Postal Service hierarchy. R1-11-30, 31.

Mr. Howard testified and stated in writing to the Examinations Specialist in Atlanta that petitioners were impossible to work with or around. He did not tell either petitioner of this problem and did not testify as to any specifics as to how petitioners were impossible to work with or around. R1-11-31, 39.

There is no Postal Service regulation prohibiting members of the same family from working at the same Post Office. There are several examples at the Rome Post Office, other than the McCollums, of more than one member of the same family working at the same Post Office. R1-11-31.

Both petitioners state that they never received call-in notices. R1-11-31, 38. Further, Mr. Howard testified in the trial noted above that he sent Timothy McCollum a call-in notice because regulations required it and that he would not have hired Timothy McCollum if he had responded. R1-11-32.

Both petitioners state that Mr. Howard has a strong dislike for the McCollum family and has had considerable animosity toward the family for some time. R1-11-32, 39, 40.

David McCollum, petitioners' father and Postmaster at Armuchee, Georgia since December 1963, has had extensive experience in hiring employees for the United States Postal Service. R1-11-46. He stated that the normal procedure for hiring rural carriers is for the appointing official, usually the Postmaster at the office where the vacancy exists, to select an applicant from a hiring worksheet containing the names of qualified persons eligible for the position. The Atlanta Sectional Center sends hiring worksheets to the Rome Post Office with three or more names listed in order of qualification by examination score. R1-11-46, 47.

The Director of Employee and Labor Relations at the Atlanta Sectional Center has told Postmasters that they should normally hire from the top of the hiring worksheet. However, if they have established a pattern of hiring from a particular location on the worksheet, whether the top or not, and break the pattern, such might constitute evidence of discrimination. The Director further informed Postmasters that they must have good reasom for varying their pattern or for not selecting the first name on a register. R1-11-47.

On at least one occasion in the past Postmaster Howard has based his hiring decision on numerical score. R1-11-44.

The Court of Appeals concluded that petitioners did not identify any constitutional property or liberty interest upon which to base the claim against Mr. Howard. App. p. 2.

C. Existance of Jurisdiction in the Court Below

Petitioners' applicable claims in the United States District Court for the Northern District of Georgia were based on the Fifth Amendment to the Constitution of the United States. District Court jurisdiction was invoked under 28 U.S.C. 1331. The case was reviewed by the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT PETITIONERS HAVE NO PROPERTY RIGHT IN BEING CONSIDERED ON THEIR MERITS FOR POSTAL SERVICE EMPLOYMENT.

The District Court reached the conclusion that petitioners did not set out more than a claim of eligibility for federal employment and that this is no more than a unilateral expectation of employment and thus not a protected property right. The District Court further held that there is no constitutionally protected right in being given federal employment. R1-14-5.

In light of this Court's decision of *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487 (1985), as well as earlier decisions, it is far too broad a statement to say that there is no property interest in federal employment. See *Perry v. Sindermann*, 408 US 593 (1972). In *Loudermill*, the Supreme Court of the United States very clearly held that tenured public workers have a property interest in their jobs.

Certainly petitioners are applicants for employment rather than tenured employees or persons otherwise possessed of a vested interest in a present job. However, petitioners are seeking vindication of their right to be fairly considered on the merits of their qualifications for employment. Petitioners take the further position that their qualifications and the actions of Mr. Howard are such that, if they are evaluated fairly on their qualifications and based on their positions on hiring worksheets relative to others on the worksheets, they would have been selected for employment. The theory of their argument here is that every applicant for federal employment has a right, protected by the Constitution, to be considered fairly and in accordance with law and regulation. This right was denied to petitioners by the improper conduct of Mr. Howard.

Obviously courts cannot take over the hiring process for federal agencies, and it may well be appropriate for persons making allegations such as are made here to have a heavy burden to overcome the presumption of regularity accorded to government actions. Yet they should be allowed to attempt to meet that burden at trial. Courts should be at least as zealous in protecting applicants' rights in law suits involving applications as in the case of persons already employed. Those already employed generally have some enforceable rights against arbitrary or discriminatory action by employers. Applicants have little or no rights

outside the judicial system, absent discrimination cognizable under Title VII or some similar statute.

As this Court has said:

> "It requires no argument to show that the right to work for a living in the common occupations of the country is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment [in the cited case the Fourteenth] to serve...If these could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of equal protection of the laws would be a barren form of words." *Truax v. Raich*, 239 US 33, 41 (1915).

Nor should equal protection or due process rights be denied on the basis of the personal dislike of a supervisor for an applicant or the applicant's family. The District Court has held that the selecting official's personal dislike for the applicant does not establish a constitutional violation. R1-14-6. The Court of Appeals agreed. App. 2. If this is the current state of the law, our system can no longer tolerate the existence of such a situation. We submit that any reason based on a personality clash or any personal feelings of ill-will cannot be a proper basis for federal employment decisions. A federal managerial official must not let his personal feelings of animosity toward an employee or applicant, let alone a member of an employee's or applicant's family, dictate his judgement on personnel decisions. He must base his decision on qualifications and performance, not his personal relationships. Anything less is a breach of his public duty and patently violates the victim's constitutionally protected rights to a full and fair consideration as provided by statute and regulation.

In a case in which this Court was asked to recognize a cause of

action, the existence of which until then had been uncertain to say the least, the Court quoted with approval from *Bell v. Hood*, 327 US at 684:

> " '...where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' " *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 US 388, 392 (1971).

Again some years later the Court said:

> "...unless these rights [justiciable constitutional rights] are to become merely precatory, the claims of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis v. Passman*, 442 US 228, 242 (1979).

As noted by the District Court, property rights are not created by the Constitution. *Board of Regents v. Roth*, 408 US 564 (1972). Where do such rights come from? *Roth* says that they come from "an independant source such as state law." *Id.* at 577. In a later case, this Court stated that they could "be created by ordinance, or by an implied contract." *Bishop v. Wood*, 426 US 341, 345 (1976). The Court of Appeals for the Fifth Circuit has held that the required Fifth Amendment interest may be created by agency regulations. *Young v. United States* 498 F.2d 1211 (5th Cir. 1974).

In the instant case, the rights sought to be vindicated are based on a federal statute and the regulations promulgated pursuant to it. Although many of the federal personnel laws do not apply to the Postal Service, under 39 USC 1001(b) appointments and promotions of officers and employees in the United States Postal Service "shall be in accordance with the procedures established by the Postal Service." The

Postal Service has established certain procedures with regard to hiring which are applicable here and which invest all applicants with the right to fair and equal consideration based on merit.

Many of the Postal regulations relating to hiring are found in United States Postal Service Handbook P-11 Personnel Operations. That handbook requires appointing officers to consider all available qualified applicants (Section 261.324a) and "to select the best qualified applicant from the register of eligibles." Section 265.2. That section also requires appointing officers to use the rule of three in making selections. This rule, set out in Section 264.21 of the handbook, requires that selection be made "from among the three highest rated eligibles who are available for the type of appointment being offered from the appropriate register." The handbook also provides that "Appointing officers are responsible for making selections for appointment. They may not discriminate for any nonmerit factors..." Section 264.1. As one court noted, "It goes without saying that the Postal Service may not act in contravention of its governing regulations." *Peoples Gas, Light and Coke Company v. United States Postal Service*, 658 F.2d 1182, 1192 (7th Cir. 1981).

These regulations illustrate that, even though the Postal Service is not subject to most federal personnel laws, the Postal Service has chosen to conduct itself in the spirit of the competitive civil service which, ideally, is present in the personnel actions of other federal agencies and which was established in 1883 by the Pendleton Civil Service Act, 22 Stat. 403, "a major piece of reform legislation designed to eliminate the abuses associated with the patronage system from much of the federal service." *Hampton v. Mow Sun Wong* 426 US 88, 106 (1976). Indeed one of the primary reasons form the creation of the United States Postal Service was to remove the influence of politics from the Postal Service. It would be a bad bargain indeed if the statutory and regulatory scheme making up the present Postal Service were found to be one which

has substituted the influence of personal likes and dislikes for the influence of politics.

As set out in the Statement of Facts herein, Postal Service officials have told Postmasters that they should normally hire from the top of a hiring worksheet and must have a good reason for not doing so. Mr. Howard has in the past taken the position that the applicant with the higher score should be selected.

Further, the Courts have held that improper motives in carrying out what would otherwise be an authorized act can constitute a violation of consitiutional rights. This Court has held that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman v. Updegraff*, 344 US 183, 192 (1952). The same rationale applies to applicants as well as incumbents. In the context of an application for the bar examination, the Court has said:

> "Even in applying permissible standards, officers of a state cannot exclude an applicant where there is no basis for the finding that he fails to meet those standards, or when the action is invidiously discriminatory." *Schware v. Board of Bar Examiners*, 352 US 232, 239 (1957).

This Court has continually held that a person cannot be excluded from employment for such non job-related factors as political affiliation. *Cafeteria and Restaurant Workers v. McElroy*, 367 US 886 (1961); *United Public Workers of America v. Mitchell*, 330 US 75 (1947). Neither should someone be excluded from Postal Service Employment because he or she is a member of a particular family.

As the District Court noted, this Court in *Bishop v. Wood*, *supra* stated that "The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill advised personel decisions." *Id.* at 350. Here however the decisions of Mr. Howard were not merely incorrect or ill advised. They were deliberately based on personal bias and dislike for the McCollum family. Thus they exceeded the bounds of discre-

tion and reached into the area of illegality, a situation where the courts will act to correct such abuse of authority. *Peoples Gas, Light, and Coke Company, supra.*

II.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT NO LIBERTY INTEREST OF PETITIONERS WAS INFRINGED.

The District Court believed that petitioners did not allege publication sufficient to cause a stigma to be attached to their reputation in the community and that thus no protected liberty interest was infringed. R1-14-6. Yet, Mr. Howard told the Examinations Specialist in Atlanta, by memorandum, that petitioners "are impossible to work with or around." Such a statement certainly damages petitioners' reputations. Further, this Court has held that a rule which bars one from employment "in a major sector of the economy - is of sufficient significance to be characterized as a deprivation of an interest in liberty." *Hampton v. Mow Sun Wong, supra*, at 102. So too with respondent's arbitrary foreclosure of petitioners' employment opportunities with a major desirable employer in the Rome area.

Thus petitioners' interest in being fairly considered for federal employment in accordance with Postal regulations and in not having such consideration arbitrarily forclosed by nonmerit factors, whether characterized as a property or liberty interest, is an interest within the protection of the Fifth Amendment to the Federal Constitution.

III.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT THERE WERE NO ISSUES OF MATERIAL FACT TO BE RESOLVED.

As noted by the District Court, summary judgment is authorized when " there is no genuine issue as to any material fact and.. the moving party in entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. The District Court also recognized that in determining a motion for summary judgment it was not to resolve issues of fact but merely to determine whether there existed an issue of fact to be tried. *Warrior Tombigbee Transportation Co. v. M-V Nan Fung*, 695 F.2d 1294 (11th Cir. 1983). The District Court determined that there no material issues because it accepted petitioners' view of the facts - that the Postmaster based his refusal to hire petitioners on his personal dislike for the McCollum family - and determined that as a matter of law such a situation did not constitute a violation of petitioners' constitutional rights. As argued above, petitioners strongly urge that it did constitute such a violation. If their legal position is correct, and if the respondent wishes to contest petitioners' contention as to his motive for refusing to consider petitioners for employment, there would certainly exist material issues which would have to be resolved before judgment could be entered. Thus petitioners urge that respondent did not carry the heavy burden imposed on movants for summary judgment.

CONCLUSION

For the forgoing reasons, it is urged that the lower courts' decisions that petitioners did not show infringement of a constitutionally protected interest is contrary to the proper interpretation of this Courts's decisions and therefore it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

WILLIAM D. MALLARD, JR.
MALLARD & MINOR
2900 Chamblee-Tucker Rd.
Building 6
Atlanta, Georgia 30341
(404) 457-9077
Attorney for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8174
Non-Argument Calender

VICKIE DORSEY,

Plaintiff-Appellant,

versus

GEORGE T. HOWARD, individually and
UNITED STATES POSTAL SERVICE,

Defendants-Appellees.

No. 86-8176
Non-Argument Calender

TIMOTHY D. McCOLLUM,

Plaintiff-Appellant,

versus

GEORGE T. HOWARD, individually, and
UNITED STATES POSTAL SERVICE,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(September 16, 1986)

Before RONEY, Chief Judge, HATCHETT, Circuit Judge, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

Upon examining the briefs and record filed in these consolidated cases, the Court finds that the district court's conclusions on each issue are correct and foreclose appellants' arguments herein. The essence of plaintiffs' claims is that they have a constitutional right to be "considered fairly for federal employment," and that the refusal of the defendant postmaster to consider them fairly was because of personal dislike. The plaintiffs have failed to identify any constitutional property or liberty interest upon which to base the claim against the postmaster. *See Bishop v. Wood*, 426 U.S. 341 (1976); *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182, 1185-87, (11th Cir. 1985); *Favors v. Ruckelshaus*, 569 F.Supp. 363, 368 (N.D. Ga. 1983) The claims against the United States Postal Service are barred by the Federal Tort Claims Act. *See McCollum v. Bolger*, ____ F.2d ____ (11th Cir. 1986) [Slip Op. p. 4478, July 23, 1986].

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

TIMOTHY D. McCOLLUM,

Plaintiff,

CIVIL ACTION

v.

NUMBER C85-72R

GEORGE T. HOWARD,
Individually and UNITED
STATES POSTAL SERVICE,

Defendants.

VICKIE DORSEY,

Plaintiff,

CIVIL ACTION

v.

NUMBER C85-73R

GEORGE T. HOWARD,
Individually and UNITED
STATES POSTAL SERVICE,

Defendants.

ORDER

These cases are before the Court on defendant's motion for summary judgment under Fed. R. Civ. P. 56(b). Plaintiffs, sister and brother, have filed identical two-count complaints alleging that their Fifth Amendment rights were violated when they were refused employment by the

defendants, the United States Postal Service and George T. Howard, the Postmaster of Rome, Georgia. Because plaintiff's complaints fail to make out a claim of deprivation of a recognized property or liberty interest the Court will grant defendant's motion for summary judgment.[1]

BACKGROUND

The facts, according to the plaintiffs, are as follows. On October, 23, 1979, plaintiffs took the examination for substitute rural letter carrier. They both passed the test. On May 5, 1980 Postmaster Howard informed plaintiffs by letter that they had been disqualified from employment because they had falsified their employment applications. The area of falsification involved a question on the application that asked whether or not the Postal Service is a U.S. Government Agency. Both plaintiffs answered that question negatively. By a letter to one of the plaintiffs dated July 30, 1980, an Assistant Postmaster General in Washington D.C. informed the plaintiff that the answer appeared to be a "misunderstanding rather than intentional falsification," on the part of the plaintiff. Plaintiff Dorsey was informed that she could amend her application to correct that answer and that upon receipt of the new application plaintiff's eligibility would be restored to the active register. Evidently, despite these problems, plaintiffs names were placed on the active register beginning in 1979.

Plaintiffs assert that their names appeared on numerous hiring worksheets furnished to the Rome Post Office during 1980 and 1981 but they were not selected for employment. Plaintiffs deny that they failed to appear following call-in notices by the Post Office. Plaintiffs contend that the "true reason...[for their rejection was the Postmaster's] long standing dislike for the family of the plaintiffs..." (Plaintiff's com-

---

[1] Defendants presented the Court with both a motion to dismiss under Fed. R. Civ. P. 12(b)(1)(2) and (6) and a motion for summary judgment under Fed. R. Civ. P. 56(b). Because the Court has considered the pleadings and affidavits submitted by both parties it will rule on the 56(b) motion, as a 12(b)(6) motion can be based only on the facts as alleged in the complaint. Because sufficient information is available in the pleadings and papers in support of and opposition to the motion, a hearing would be of no

(Footnote Continued)

plaint, filed March 19, 1985 ¶8).

Plaintiffs each contacted an Equal Employment Opportunity (EEO) Counselor on June 10, 1981. On July 16, 1981, plaintiffs filed formal EEO complaints of discrimination. The government declined to pursue the complaints.

On March 19, 1985, Plaintiffs filed their complaint with this Court and alleged that Postmaster Howard violated their Fifth Amendment rights when he failed to consider them for employement because of his personal dislike for plaintiffs and plaintiffs' family. Plaintiffs also alleged that the Postal Service denied them their Fifth Amendment rights by allowing Postmaster Howard to refuse to consider them for employment.

Fed. R. Civ. P. 56(c) authorizes summary judgment when "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment bears the burden of demostrating that no dispute at to any material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). In assessing whether the movant has met this burden, the evidance and all factual inferences should be viewed in the light most favorable to the party opposing the motion. *Bradbury v. Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983). In deciding a motion for summary judgment, "it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). The Court finds that the movant has met their burden in this matter.

PROPERTY RIGHTS AND DUE PROCESS

Where the right to employment is the property issue in question, due process concerns are triggered when it can be shown that: 1. The clai-

---

(Footnote Continued)
utility prior to the entering of this order. *See, Milburn v. United States*, 734 F.2d 762 (11th Cir. 1984); *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981).

mant possessed a property interest in the position at issue, or; 2. The stigma attached to the employment decision, or subsequent publication of the decision, damaged the reputation of the claimant in the community. *See, Board of Regents v. Roth*, 408 U.S. 564, 572-77 (1972). The *Roth* case is the keystone for any understanding of property rights in employment disputes. The Supreme Court wrote:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Roth 408 U.S. at 577

The source of such a legitimate claim of entitlement is not to be found in the Constitution, but in the legislative determinations of federal and state governments. *See, Cleveland Board of Education v. Loudermill, et. al.*, 53 U.S.L.W. 4306, 4307 (March 19, 1985); *Roth*, 408 U.S. at 577. Once the benefit of public employment is *conferred* by the legislature, its deprivation cannot be effected without appropriate procedural safeguards. *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J. concurring in part and concurring in result in part). But it is equally clear that there is no Constitutionally protected right, no protected property interest, in being given government employment. *See, Favors v. Ruckelshaus*, 569 F.Supp. 363, 367 (N.D.Ga. 1983); *Coleman v. Darden*, 595 F.2d 533, 538 (10th Cir.) *cert. denied* 444 U.S. 927 (1979).[2]

Accepting all their allegations as true, plaintiffs here have set out no more than a claim of eligibility for employment with the postal service.

---

[2] The Supreme Court has noted the inappropriatness of the federal court as a forum for the review of personnel decisions of public agencies. *See, Bishop v. Wood*, 426 U.S. 341 (1976) in which the Supreme Court held:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies...The Due Process Clause...is not a guarantee against incorrect or ill-advised personnel decisions.

Id. at 349-50.

Such eligibility is no more that the "unilateral expectation" noted in *Roth*. While plaintiffs may have been qualified for the positions they sought, and may have occasionally appeared at the head of the hiring lists, they have not presented any evidence to show that the postmaster was then required to hire them. Eligibility alone does not create a property interest, and cannot support plaintiffs claim here. *See, MacFarlane v. Grasso*, 696 F.2d 217 (2nd Cir. 1982). Plaintiffs cannot show that the postmaster is *required* to take the applicants who are at the head of hiring lists. That the postmaster may often take names from the top of the list of eligibles, and did not do so here, does not state a claim of a due process infringement. *Smith v. State of Georgia*, 684 F.2d 729, 732 (11th Cir. 1982). Plaintiffs citation of Postal Service Regulations does not support a claim of irregularity or action in contravention of the Services governing regulations. The plain language of those regulations shows that they neither establish a right of plaintiff's to employment, nor prohibit the Postmaster from administering a new examination before the register of eligible employees is exausted.

The cornerstone of plaintiffs complaint is the alleged personal dislike of the postmaster for plaintiffs, and members of their family currently employed by the postmaster. Without more than that the complaint does not state a constitutional claim. *See, Bishop v. Ward*, 426 U.S. at 349-50 (1976). A selecting official's personal dislike for an applicant for a federal position does not establish a constitutional violation. *Favors v. Ruckelshaus*, 569 F.Supp. 363, 368 (N.D. Ga. 1983). Furthermore, plaintiffs do not allege any publication of the postmaster's decision sufficient to cause a stigma to attach to plaintiff's reputation in the community. *Bishop v. Wood*, 426 U.S. 341, 348 (1976); *Jones v. State of Ga.*, 725 F.2d 622, 623 (11th Cir. 1984). Plaintiffs have grouped various cases together that represent constitutional doctrine in the defense of recognized property rights. Yet plaintiffs create no coherent doctrine from these cases to support their claim that any constitutionally recognized rights have been infringed upon by the postmaster or the United States Postal Service.

BACK PAY & BENEFITS

As this Court held in *Tony D. McCollum v. Bolger*, Civil Action No. 83-279R (ND Ga.), a claim for back pay is one for monetary damages, and is therefore precluded by the doctrine of sovereign immunity. Courts have uniformly viewed the request for back pay as a demand for damages. *Beller v. Middendorf*, 632 F.2d 788, 799 n.5 (9th Cir. 1980); *Penn v. Schlesinger*, 490 F.2d 700, 705 (5th Cir. 1973), *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974). Thus plaintiff's claims for back pay are barred.

Nor can plaintiffs maintain a claim under the Federal Tort Claims Act (FTCA) for the decision not to hire them. Federal employment decisions are discretionary and may not form the basis of an action under the FTCA. *Radford v. United States*, 264 F2.d 709 (5th Cir. 1959); *Young v. United States*, 498 F.2d 1211 (5th Cir. 1974). Plaintiffs citation of cases involving suits against the Postal Service for garnishment proceedings and breach of contract are inapposite to their argument. Such an action may be pursued against the Postal Service only if it is authorized by the FTCA. *Insurance Company of North America (INA) v. United States Postal Service*, 675 F.2d 756, 758 (5th Cir. 1982). Plaintiffs claims are not so authorized.

Plaintiffs have shown no impairment of any recognized property or liberty interest. They have stated no claim under the Fifth Amendment for which relief may be granted. The facts when viewed most favorably towards the plaintiffs show that defendents are entitled to a judgment as a matter of law.

ACCORDINGLY, the defendants motion for summary judgment is GRANTED.

IT IS SO ORDERED, this the 31st day of December, 1985.

UNITED STATES DISTRICT JUDGE

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8174
Non-Argument Calender

D.C. Docket No. 85-73

VICKIE DORSEY,

Plaintiff-Appellant,

versus

GEORGE T. HOWARD, individually and
UNITED STATES POSTAL SERVICE,

Defendants-Appellees.

No. 86-8176
Non-Argument Calender

D.C. Docket No. 85-72

TIMOTHY D. McCOLLUM,

Plaintiff-Appellant,

versus

GEORGE T. HOWARD, individually, and
UNITED STATES POSTAL SERVICE,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

Before RONEY, Chief Judge, HATCHETT, Circuit Judge, and HENDERSON, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the said District Court in these causes be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 16, 1986
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: OCT. 9 1986

Supreme Court, U.S.
FILED
FEB 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-979

In the Supreme Court of the United States

OCTOBER TERM, 1986

VICKEY DORSEY AND TIMOTHY D. MCCOLLUM, PETITIONERS

v.

THE UNITED STATES POSTAL SERVICE AND
GEORGE T. HOWARD, POSTMASTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bishop v. *Wood*, 426 U.S. 341 (1976) 3

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 2, 4

Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976) 4

Paul v. *Davis*, 424 U.S. 693 (1976) 4

Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) 3

Wisconsin v. *Constantineau*, 400 U.S. 433 (1971) 4

Constitution:

U.S. Const. Amend. V (Due Process Clause) 1, 2, 4

Miscellaneous:

USPS, *Handbook P-11, Personnel Operations* (May 30, 1980) 3

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-979

VICKEY DORSEY AND TIMOTHY D. MCCOLLUM, PETITIONERS

v.

THE UNITED STATES POSTAL SERVICE AND
GEORGE T. HOWARD, POSTMASTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that their Fifth Amendment due process rights were violated when respondent Howard, the Postmaster in Rome, Georgia, refused to hire them as substitute rural letter carriers.

1. Petitioners filed identical complaints in the United States District Court for the Northern District of Georgia naming Howard, in his individual capacity, and the United States Postal Service as defendants. Petitioners alleged that their Fifth Amendment rights were violated when Howard refused to hire them because of personal dislike for them

and their family (Pet. App. 7).[1] Petitioners sought employment, back pay, and monetary damages (*id.* at 8).[2]

The district court granted summary judgment for Howard and the Postal Service, concluding that petitioners' claims implicated neither a property nor a liberty interest protected by the Due Process Clause. Specifically, the court found that petitioners had stated "no more than a claim of eligibility for employment with the postal service," a claim falling far short of any "legitimate claim of entitlement" (Pet. App. 6-7). The court also found that petitioners had failed to allege any publication of the Postmaster's decision sufficient to cause a stigma to attach to their reputation in the community (*id.* at 7). The court of appeals affirmed in a per curiam opinion (*id.* at 2), agreeing that petitioners "failed to identify any constitutional property or liberty interest" upon which to base their claims (*ibid.*).

2. The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits, and there is no conflict with any decision of this Court. The case presents no significant legal question and warrants no further review.

a. Petitioners have no constitutionally protected right to be hired as substitute rural letter carriers. "To have a property interest in a benefit, a person clearly must * * * have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Petitioners have only established that after passing the relevant tests they were eligible

---

[1]Petitioners' mother and brother were already employees of the Post Office in Rome, Georgia.

[2]Petitioners assert (Pet. iii) that the Postal Service has no interest in the outcome of this petition since only their claims against the Postmaster in his individual capacity are being raised here. Petitioners, however, have not expressly dropped their prayer for employment and back pay, and that relief if granted would run against the Postal Service.

to be hired. Such eligibility for employment constitutes at best a "unilateral expectation" of the sort found insufficient to establish a property interest in *Roth*. The Due Process Clause is not a restraint on discretionary personnel decisions, even where incorrect or ill-advised. *Bishop* v. *Wood*, 426 U.S. 341, 349-350 (1976) (footnote omitted) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs.").

Petitioners' reliance (Pet. 12-14) on Postal Service regulations to establish an entitlement to employment is misplaced. Nothing in those regulations requires that employment decisions be based exclusively on test scores or any other readily quantifiable factor. USPS, *Handbook P-11, Personnel Operations* at Section 265.12 (May 30, 1980).[3] Although a hiring official may not discriminate against an applicant on the basis of race, religion, color, sex, national origin, age or physical handicap (*id.* Section 264.1), he may consider any factors relevant to the applicant's potential job performance (*id.* Sections 265.121 and 265.123). The only explicit restriction on his hiring authority is that he must follow "the Rule of Three," which requires his selection to be made from among the three highest-rated applicants (*id.* Section 264.2). There is no suggestion that respondent Howard failed to follow that rule, nor is there any other basis for petitioners' claim that they were somehow entitled to the jobs for which they applied.[4]

---

[3]Relevant sections of this Handbook were printed in the appendix to the brief filed by respondents in the court of appeals.

[4]Petitioners err in relying (Pet. 14) on *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957). In that case, an individual challenged the Board's refusal to allow him to take the state bar examination. Under the relevant state law, the Board could do so if the applicant

b. Petitioners have also failed to assert the violation of any liberty interest protected by the Due Process Clause. Petitioners rely exclusively (Pet. 8, 15) on respondent Howard's statement, made to a Postal Service Examinations Specialist in Atlanta, Georgia, that petitioners were impossible to work with or around. Such a statement is hardly a "badge of infamy" of the sort that concerned this Court in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971). Nor does it amount to government action foreclosing petitioners from other employment. *Board of Regents* v. *Roth*, 408 U.S. at 573. See also *Paul* v. *Davis*, 424 U.S. 693, 708-710 (1976).[5]

---

failed to demonstrate "good moral character." This Court found that the evidence supported the applicant's assertion that he did have a good moral character and concluded that the Board had engaged in constitutionally invidious discrimination based on his former membership in the Communist Party. In the instant case, by contrast, there is no invidious discrimination, but at most a personality clash between petitioners and the Postmaster. And the instant case involves, not the opportunity to take an examination purportedly open to all qualified persons, but a necessarily discretionary choice between qualified persons for a fixed number of jobs.

[5]In *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976), this Court held that a Civil Service Commission regulation excluding noncitizens, including lawfully admitted resident aliens, from the federal competitive service deprived such resident aliens of liberty without due process in violation of the Fifth Amendment. In this case, by contrast, there has been no allegation that any regulations excluded petitioners from all employment with the Postal Service, nor that the Postmaster's statement has de facto resulted in such exclusion. Furthermore, unlike alienage, the inability of an applicant to get along with co-workers is not a constitutionally suspect ground for denying him employment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1987